

Mr Dominic O'Hooley

By email only: [request-668796-b4711f45@whatdotheyknow.com](mailto:request-668796-b4711f45@whatdotheyknow.com)

27 August 2020

Dear Mr O'Hooley,

### **Internal review of your request**

I refer to your email of 27 July 2020 requesting a review of the GDC's response to your request under the Freedom of Information Act 2000 (the FOI Act) in relation to the GDC's Annual Retention Fee (ARF) and the GDC's use of the government furlough scheme.

You have asked that we review our response to two aspects of your original request where the GDC decided that the information requested was exempt from disclosure under sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of the FOI Act. These were:

1. Full details of the soundings taken from the Council as stipulated in the minutes of the Council Meeting dated 13 May 2020 pertaining to the reported unanimous view that the Annual Retention Fee should not be revisited.
2. The names of Council members, the full written communication both to them and received from them regarding this matter.

I have looked again at how we handled your FOI request, the response we provided and the reasons we gave for our decision. We have also considered the four points you have raised about our decision. I set out my conclusions below.

### **Background**

First, for completeness, it might be helpful if I outline the steps the GDC took in responding to your request.

Your request was received on 4 June 2020 and on receipt the GDC's information team obtained the information you had requested; records of the exchanges between Council members about the ARF prior to Council coming to a decision that it should not be revisited.

On 16 July 2020 we sent you an update letter to explain that we considered section 36 of the FOI Act applied and that, as allowed for by the FOI Act, we required additional time to carry out a public interest test.

Ian Brack, the GDC's Chief Executive, reviewed the information in scope of your requests, collated by our Information Governance team, and recorded his opinion that sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of the FOI Act applied and that disclosure would be likely to prejudice the provision of free and frank advice to Council, the free and frank exchange of views between Council members for the purposes of decision making, and overall the effective conduct of public affairs.

On 27 July 2020 we wrote to you to explain why the public interest in withholding the information you had requested was stronger than the public interest in disclosure. We accepted that it would promote transparency to disclose the information and that disclosure may assist the public in understanding a decision that impacted on GDC registrants.

However, we also considered that discussions in relation to the ARF tend to be fairly regular and ongoing and would be likely to be impacted by disclosure, especially if, as we considered likely, Council members would feel less able to discuss the ARF and other significant matters or give views on such matters in future, if we were to disclose, under the FOI Act, exchanges Council members understood to have been conducted privately and in confidence under the Council's Standing Orders for Business. In relation to transparency, we considered that the GDC had published (abridged) minutes of the private meeting and the Chair of the GDC had published a blog discussing the factors that had led to the GDC's decision. We also considered that the smooth running of Council maybe impacted if Council was unable to hold private sessions as allowed for in its Standing Orders and that this would be likely to lead to poorer or delayed decision making.

### Section 36 of the FOI Act

The Information Commissioner's (the ICO) guidance note on the application of section 36 of the FOI Act is available on their website [here](#).

Section 36 of the FOI Act specifies who the 'qualified person' is for the purpose of the exemption; the organisation does not choose who its qualified person is. Where a person is not specified, section 36(5)(o)(iii) provides for an officer or employee of the organisation to be authorised for the purposes of this section by a Minister of the Crown. The GDC's Chief Executive is the officer authorised as the GDC's qualified person by an order of the Minister dated 14 March 2005.

For the decision to be properly taken, the 'qualified person' must have reviewed the relevant information (e.g. the information itself or a description of it, together with arguments and any evidence on what the effects of disclosure would be) and recorded their view that the exemption is engaged before a decision is taken to apply the exemption and communicated to the requestor. There is, however, nothing to stop the qualified person providing their reasonable opinion subsequently prior to an internal review being carried out or as part of the internal review process itself.

### Internal review

I have seen that the GDC properly sought and recorded the reasonable opinion of the GDC's qualified person, the Chief Executive and Registrar. The GDC's Chief Executive and Registrar recorded his reasonable opinion having had the benefit of reviewing the relevant information together with arguments and any evidence on what the effects of disclosure would be. These arguments were then communicated to you in our decision letter of 27 July.

I turn now to the points you made in your internal review request that in your opinion should lead to the information you have requested being disclosed to you.

***The nature of the ARF, its absolute central position as the financial basis for the continued operational capabilities of the GDC, and the extremely controversial recent actions, or lack of actions, regarding it, mean that the public need to know and requirement for full and complete disclosure, far outweighs any requirement for secrecy on this occasion.***

Given the ARF is the financial basis on which the whole of the GDC operates, the GDC needs to be able to ensure it can take decisions about it properly, with the benefit of proper advice and discussion. In our response of 27 July 2020, the GDC explained why decisions that Council will take in respect of the ARF in the future would be likely to be prejudiced if the information you asked for were to be disclosed to the world in response to your request under the FOI Act.

The GDC has publicly explained why, given the financial uncertainty caused by COVID-19, it would be unwise for the GDC to reduce the ARF at this stage. Though we appreciate that not all registrants agree with this assessment, that does not in itself mean that the decision was controversial, flawed, or therefore that the public interest in disclosure of the information outweighs the GDC's need to be able to discuss the ARF and other issues in the future with the benefit of proper advice and discussion and privately, without the 'chilling effect' on frankness and wide-ranging discussion that would arise, if information exchanged with the expectation that it was confidential, were to be published to the world, which is the effect of releasing information under the FOI Act.

***The GDC's Chief Executive is not best placed to provide a truly objective view of this decision, as the CEO is accountable for the liquidity of the GDC with regard to its financials, he thus has an inherent conflict of interest between that key personal performance indicator, and the need for an entirely objective decision here.***

It is common for the 'qualified person' for the purposes of section 36 of the FOI Act to be the Chief Executive of an organisation. As the GDC's Chief Executive, Registrar, and Accounting Officer is responsible for the 'liquidity of the GDC with regard to its financials' they are best placed to state how in their reasonable opinion those areas would be impacted if the information requested were to be disclosed.

***Your weighing of the public interest during the COVID-19 crisis, and enhancing the transparency of the GDC at the current time, against your disclosure of abridged minutes and the "Chair's blog", is inherently flawed. It fails to take into account the very nature of transparency when a decision that will materially affect the wellbeing of an entire profession during an emergency of unique proportions is occurring, and shows a worrying lack of appreciation for the need for your council members to be entirely open to scrutiny when deciding to affect the financial wellbeing of your registrants, even more so when you have a surfeit of funds at your disposal.***

As we explained in our response to you of 27 July 2020, we need to strike a balance between transparency and the GDC's ability to take decisions with the benefit of proper advice, free, full and frank discussion of the issues and following proper process, as provided for in the Council's Standing Orders. Although we appreciate you do not agree with how we have weighed those competing interests, the points you have made do not change our assessment of where that balance should lie.

***It is clear from the lengthy delay between my FOI, and my receipt of this rather disappointing missive, that your legally sought opinion has been complex and has not come down strongly on the side of secrecy. I would expect that this formal internal review revisits this and does the right thing. A full and candid disclosure is required.***

We are sorry for the delay in responding to your information request, though the response was within the statutorily permitted timescale, as extra time is allowed for consideration of the public interest balance. This was not because the GDC sought legal advice, simply, that the administrative process in relation to section 36 is lengthy, and in the case of more complex requests, it can take some time to carry out the public interest balancing test required.

In order for section 36 of the FOI Act to apply though, the public interest balance must clearly weigh in favour of withholding the information (which we considered it did, for the reasons originally given, and as restated above), otherwise disclosure is required. I hope you find this clarification helpful.

### **Conclusion of internal review**

Although there was a delay in the GDC responding to your request, the GDC has properly taken the decision that the information you have requested is exempt from disclosure under section 36 of the FOI Act.

Although we appreciate your strength of feeling that, in matters such as the ARF, public bodies should be totally transparent, we remain of the view that disclosure of the information you have requested would come at the cost of future decision making in respect of the ARF and other matters which the Council requires space to discuss and consider in coming to a collective decision.

Although we appreciate this was not the response you were hoping for, we hope that the explanation provide has been helpful and resolves your concerns. However, should you remain dissatisfied with the handling of your request or this decision, you have a right to appeal to the Information Commissioner at:

Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF  
Tel: 01625 545 745  
Website: [www.ico.org.uk](http://www.ico.org.uk)

Yours sincerely,



**Lisa-Marie Williams**  
***Executive Director, Legal and Governance***